MOTION FILED
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No. 93-1663

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

RANDELL P. MEANS,
Assistant United States Attorney,
in his individual capacity,
Petitioner,
v.
BRENDA CHILCUTT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF 403 ATTORNEY-EMPLOYEES OF THE UNITED STATES DEPARTMENT OF JUSTICE, IN THEIR INDIVIDUAL CAPACITIES, AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

All of the following join this motion and brief individually and *pro se*. While each may receive mail c/o Department of Justice, Washington, D.C. 20530, the Court need not send orders, etc., to any of the following as arrangements have been made to receive notice of the Court's entries through petitioner's counsel, and service of briefs by other parties is similarly waived. Phone numbers of three contact persons are indicated below and the remaining *amici* are in alphabetical order showing names only.

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MOTION FOR LEAVE TO FILE BRIEF OF 403 ATTORNEY-EMPLOYEES OF THE UNITED STATES DEPARTMENT OF JUSTICE, IN THEIR INDIVIDUAL CAPACITIES, AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

The 403 individuals identified on and inside the cover jointly seek leave, pursuant to Rule 37.2 of the Rules of this Court, to file the attached brief as *amici curiae* in support of the petition for a writ of certiorari in this case. We include 263 Assistant United States Attorneys from 46 different United States Attorney's offices around the country and 140 other attorneys employed in various Washington, D.C. offices within various divisions of the United States Department of Justice ("Department"), who

travel to and appear in federal courts throughout the United States. We do not make this submission on behalf of the United States or the Department; rather, we submit this in our individual capacities. The Department has neither encouraged us to file nor discouraged us from filing this motion and brief. We did first ascertain that the Department does not object to Department employees, in their individual capacities, joining in filing an *amicus* brief in this case. The grounds for this motion are as follows:

1. Kelly Robbins Harrington, as counsel for plaintiffs below, Brenda Wortham, f/k/a Brenda Chilcutt, and Home Indemnity Company, has orally refused to give consent to our filing an *amicus* brief (and has failed to respond to several requests for written confirmation). Randell Means (by counsel Carter Phillips) and the United States (by Solicitor General Drew Days) did give consent.

2. The court of appeals, in affirming an injunction prohibiting petitioner from asking the Department, pursuant to 28 C.F.R. § 50.15, to indemnify him for a discovery sanction, made unwarranted and improper findings of fact, not made by the district court below, that petitioner "intentionally withheld documents" and "knowingly engaged in blatant misrepresentations to the district court about the existence of those documents." As government attorneys, we each have a personal individual interest in being protected from the possibility of having our professional reputations destroyed by errant court of appeals fact findings that indicate ethical or even criminal misconduct, which the trial court either did not address or refused to find.

3. Also, each of us is an employee of the Department to whom its reimbursement regulation applies. Each of us therefore has a personal interest in seeing the court of appeals decision reversed and remanded so as to force the court of appeals to face the issue that was originally before it, but which its improper fact findings caused it

to circumvent. That is the issue of whether a court can enjoin our resort to the reimbursement regulation for the reasons stated by the district court—that taxpayers should never bear the cost of our mistakes, regardless of good faith.

4. The attached brief, while exhibiting minor overlap, is not merely duplicative of the petition. We elaborate upon certain points that were only a secondary focus of the petition and make several points not explicit in the petition. For example, we demonstrate precisely what the court of appeals was referring to when it mistakenly stated that the district court found that petitioner exhibited a "flagrant disregard for his discovery obligations." We point out that vacating procedurally defective findings of serious ethical misconduct by attorneys is an imperfect remedy such that this Court should admonish the courts of appeals to cease from making such findings. We demonstrate that the court of appeals' improper findings of egregious willful misconduct blinded it to a number of important legal issues raised by the district court's two injunctions, which issues it all but ignored. In this regard, we add increased focus both (1) on the part of the injunction directed at the costs of plaintiffs' deposing the independent contractor and (2) on the supplemental reimbursement injunction, related to the payment for the attendance of plaintiffs' counsel at a post-trial contempt/disciplinary hearing.

5. We are aware that the National Association of Assistant United States Attorneys ("NAAUSA") will be filing, or at least seeking leave to file, a brief as *amicus curiae* in support of the petition. However, NAAUSA does not include attorneys employed at the Department's headquarters in Washington, D.C. and many of the Assistant United States Attorneys joining this motion and brief in their individual capacities are not members of

NAAUSA. We are attempting not to duplicate what we understand will be the focus of NAAUSA's brief.

Respectfully submitted,

The 403 attorneys listed on and inside the cover, *pro se*

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May 23, 1994

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BRIEF OF 403 ATTORNEY-EMPLOYEES OF THE UNITED STATES DEPARTMENT OF JUSTICE, IN THEIR INDIVIDUAL CAPACITIES, AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

INTRODUCTION

As indicated in the motion for leave to file this brief, the individuals who have joined this brief as *amici curiae* in support of the petition are 403 attorneys who are employed by the United States Department of Justice ("Department") to represent the United States of America in criminal and civil cases throughout the country, including 263 Assistant United States Attorneys from 46 different districts and 140 trial attorneys employed in various Department offices and divisions located in Washington,

D.C. We submit this in our individual capacities and not on behalf of the United States or the Department of Justice, which has neither encouraged us to file nor discouraged us from filing this brief. We did first ascertain that the Department does not object to Department employees, in their individual capacities, joining in filing an *amicus* brief in this case.

We would add that the communications among us that resulted in this submission were informal, and we expect that the vast majority of Assistant United States Attorneys around the country and attorneys employed at the Department's headquarters were unaware of our endeavor at the time of filing.

INTEREST OF *AMICI CURIAE*

The district court in this case, pursuant to Fed. R. Civ. P. 37(d), ordered the petitioner, an Assistant United States Attorney, to personally compensate plaintiffs for their expenses incurred both in moving to compel discovery responses that were late and in deposing an independent contractor responsible for cleaning the floor of the U.S. Postal facility where the plaintiff slipped and was injured. Further, on its own motion, the court enjoined petitioner from exercising his rights under a Department of Justice regulation to request indemnification of the monetary award.

The court of appeals, in affirming that injunction, ignored the relatively non-accusatory (but legally insufficient) basis upon which the district court entered the injunction—viz, that the cost of petitioner's mistakes in respect to discovery compliance should not be borne by the taxpayers. Instead, the court of appeals made unwarranted and improper findings of fact that petitioner "intentionally withheld documents" and "knowingly engaged in blatant misrepresentations to the district court about the existence of those documents." These improper appellate-level fact findings do grievous harm to petition-

er's professional reputation far exceeding the economic impact of the order from which the appeal was taken.

It appears to us, as government attorneys, that allegations of prosecutorial or professional misconduct by our adversaries in criminal and civil cases, unfortunately, have become increasingly frequent. We each therefore have a personal individual interest in being protected from the possibility of having our professional reputations destroyed by errant court of appeals fact findings that indicate ethical or even criminal misconduct, which the trial court either did not address or refused to find. This interest extends to any case, whether civil or criminal, involving allegations of misconduct at the trial court level that are expressly relied upon on appeal as a ground for affirmance of a judgment against the United States or reversal of a judgment in its favor. This interest also extends to cases, such as petitioner's, in which one of us, personally, may be appealing a sanction, and especially if the sanction was ordered for conduct of a nature far less egregious than that which is then "found" by the court of appeals.

Further, each of us is an employee of the Department to whom its reimbursement regulation applies. That regulation is intended partly for our personal benefit—to protect us against incurring substantial expense in the good faith performance of our duties. The regulation states that any "Department of Justice employee may request indemnification to satisfy a verdict, judgment, or award entered against the employee." 28 C.F.R. § 50.15(c)(4). Each of us therefore has a personal interest in seeing the court of appeals decision reversed and remanded so as to force the court of appeals to face the issue that was originally before it but which its improper fact findings caused it to circumvent. That is the issue of whether a court can enjoin our resort to the reimbursement regulation for the reasons stated by the district court—that taxpayers should never bear the cost of our mistakes, regardless of good faith or how heavy an attorney's case load may be.

STATEMENT

We rely upon the facts set forth in the Statement contained in the petition.[1] Not every one of us has individually familiarized himself or herself with the record below. Those of us who have not are nevertheless sufficiently disturbed by the case as it has been described, both in the petition and by trustworthy colleagues, to express dismay at both the result and the process by which it was reached. Those of us who have reviewed the record find the petition fully accurate.[2]

REASONS FOR GRANTING THE PETITION

We also adopt the petition's statement of "Reasons for Granting the Petition" and would add or stress the following points. The law is well established that courts of appeals may not find facts. *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 714 (1986). There may arguably be an exception where the evidence points only one way such that facts are established "as a matter of law," but that is not the case here (at least not in the direction of supporting the Fifth Circuit's findings). The law is equally well established that, although appellees may defend a judgment based upon contentions reserved in the trial court, courts of appeals generally do "not consider an issue not passed upon below." *Singleton* v. *Wulff*, 428 U.S. 106, 119-20 (1976). Exceptions may be made in extraordinary cases, such as where injustice might otherwise result, *id.* at 121, but this is not such a case. *See also Hormel* v. *Helvering*, 312 U.S. 552, 556-57 (1941). Where an issue has not even been raised

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[1] The remainder of this brief presumes a prior reading of the petition and thus refers to certain persons, things, and events in a short-hand fashion similar to the petition. "Pet." citations refer to the pages of the petition. "Pet. App." citations refer to the pages of the appendix bound with the petition.

[2] We are aware that one of the two pages comprising the "Svede log" referred to in the petition was inadvertently left out of the appendix to the petition. The omitted page makes no reference to plaintiff's accident or any other accident at the River Bend facility.

before the trial court, it is particularly improper for a court of appeals to resolve it.

Here, plaintiffs did not request the injunction and they sought to defend it on appeal only on the basis upon which the district court had entered it. There was no finding that petitioner lied or was contumacious, and there could not have been any such finding at the time of the injunction, as the district court was then completely unaware of the existence of the Svede log. Neither was there any district court finding of "flagrant disregard" for discovery obligations as suggested by the court of appeals. 4 F.3d at 1326 n.35 (Pet. App. at 27a n.35).[3] To the contrary, when the injunction was entered, the district court knew only that petitioner Means was late serving his discovery responses, that the Postal Service had not timely provided all information and documents,[4] and that petitioner had not interviewed an independent contractor before serving his responses to plaintiffs' interrogatories (which the district court appeared to view most seriously).

Nor did the appeal from the judgment against the government warrant the errant appellate fact findings.

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[3] The fact portion of the Fifth Circuit opinion quotes the trial judge as expressing concern over what appeared to be "a rather flagrant violation of the discovery obligations" by Mr. Means. 4 F.3d at 1319 (Pet. App. at 10a). However, this quote is from the trial judge's explanation of why he determined to hold the July 28 contempt hearing, and is expressly a reference to the "subject of the accident log, which appeared to be . . . a rather flagrant violation of the discovery obligations." July 28 Tr. at 4 (Pet. App. 58a). At the time the injunction was issued, the district court had no knowledge of the existence of the Svede log. And, at the time it made this comment on how things "appeared," the district court had not yet heard the explanation that there were two logs.

[4] We recognize that petitioner has "admit[ted] he made mistakes and he regrets them." (Pet. at 27.) Indeed, he could have formally moved for an enlargement of time or responded timely with such information as he had received from the Postal Service.

Plaintiffs never accused petitioner personally of lying or deliberately concealing evidence, either in seeking sanctions against the government or in defending the judgment on appeal. To the contrary, in attempting to defend the judgment against the government, plaintiffs' brief expressly attacked the credibility only of the postal employees and accused only the postal employees of deliberately withholding documents—implicitly from petitioner as well as from plaintiffs.[5]

Because the law precluding appellate fact findings is so well established, we agree with petitioner that this Court need not entertain briefing and argument in this case, but rather should summarily reverse and remand the case to the court of appeals to reconsider its ruling without resorting to fact finding. We submit that the court of appeals should also be directed to focus on the basis upon which the district court entered the injunction; it should not entertain hypothetical legal premises upon which the district court might otherwise have entered an injunction against reimbursement that were not passed upon by the district court. If the Fifth Circuit determines on remand that supplemental fact findings are necessary (which is not to say that they are), it may remand the case to the district court for that purpose, but it should not substitute its own fact findings for those made, or omitted, by the district court.

Summary reversal would go a long way toward eliminating the harm to petitioner's reputation flowing from

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[5] Brief for the Appellees at 7, 10 (5th Cir., filed Jan. 25, 1993). We express no opinion on whether postal employee Al Svede concealed the Svede log or, as he testified, forgot about its existence until the afternoon it was disclosed and produced. That Svede had not theretofore disclosed it to petitioner is corroborated and unrebutted, and was not contested by plaintiff. At the same time, we would add that the court of appeals should not have cast aspersion on Svede's credibility when the district court found him honest. July 28, 1992 Tr. at 84 (Pet. App. at 114a.)

the court of appeals' errant fact findings. At the same time, petitioner's reputation probably can never be fully restored. Apart from the publicity the Fifth Circuit decision generated,[6] its opinion will forever be available in West's Federal Reporter and through on-line legal research services (via a search for petitioner's name). Even if this Court vacates the improper fact findings, those who come across the Fifth Circuit opinion may continue to wonder whether those findings were or were not correct. In fact, as the petition implicitly demonstrates (assuming its depiction of the record is accurate), the court of appeals' findings, if made by a trial court, could not survive ordinary appellate review under a "clearly erroneous" standard.[7]

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[6] *E.g.*, *The Texas Lawyer*, Nov. 1, 1993 ed. (vol. 9, no. 33), at 8; ABA, *Pass it On: The Newsletter of Government and Public Sector Lawyers Division*, Feb./Apr. 1994 ed. (vol. 3, no. 3), at 7. The latter article characterized the case as one "with wide-ranging implications for government lawyers."

[7] The court of appeals' most critical findings of fact inhere in the opinion's statement that petitioner "had previously referred to the [Svede] accident log several times, both in his [June 3, 1992] response to [plaintiffs'] supplemental motion for sanctions and in a [June 4, 1992] hearing before the court in which he had affirmed as an officer of the court, that he had reviewed that particular log." 4 F.3d at 1319 (Pet. App. at 10a) (footnotes omitted). The opinion purports to support these findings with cross-references to footnotes 11 and 12 of the opinion, which quote petitioner's representations. *Id.*, nn. 15 & 16. *See also id.* at 1318, 1323 (Pet. App. at 7a, 19a). As the petition demonstrates, the excerpt of petitioner's statements to the district court on the morning of June 4, quoted in footnote 12 of the opinion, which the court of appeals found to reveal his prior personal examination of the Svede log, includes, in the very same sentence, a description of "the time periods in that log" as covering accidents during the period "1987 through the present." *Id.* at 1318 n.12 (Pet. App. at 8a n.12). This was the period covered by the Kunkle safety office logs. (R. 436.) The Svede log, however, covers accidents occurring only in 1988 and 1989. Petitioner, therefore, clearly was referring not to the Svede log, as the court of appeals found, but rather to the Kunkle logs—the only logs of which he was then aware, as later

Because there is no ordinary appellate review of appellate-level fact findings, this Court is the only forum for relief in such cases. Moreover, because the harm to an attorney's reputation from procedurally-defective fact findings generally cannot be entirely eliminated by a higher court's reversal, it is important for this Court not only to grant the relief sought by the petition but also to admonish the courts of appeals not to make findings of fact regarding alleged ethical misconduct at the trial level. Summary reversal would convey that message forcefully here.

This problem is not an isolated one. We understand that the *amicus* brief of National Association of Assistant United States Attorneys will cite other instances where the courts of appeals have reached out to condemn government attorneys for perceived misconduct not found by the trial court. The courts of appeals rightfully expect government attorneys to adhere to the highest standards of professional ethics. However, no matter how much it may seem that willful misconduct may have occurred, the courts of appeals must resist the temptation to assume facts not adjudicated below or render legal judgments on issues not presented on appeal.

Summary reversal will help assure government attorneys (and attorneys generally) that when courts of appeals do deviate from accepted procedure and make fact findings respecting ethical misconduct, they will be corrected.

Summary reversal will also assure that the court of appeals must face the important issue originally presented

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revealed by the July 28 testimony of both petitioner and Al Svede. To the extent the court of appeals also was disturbed by that part of petitioner's June 3 response to plaintiffs' supplemental sanctions motion which responds expressly to plaintiffs' contention that Al Svede had a responsive log, that part of petitioner's June 3 response expressly states that it is "based upon the answer provided by Al Svede" and not on petitioner's personal examination of, or knowledge of the existence of, the Svede log. 4 F.3d 1318 n.11 (Pet. App. at 7a n.11).

to it on appeal—whether petitioner was properly enjoined from requesting indemnification under the Department's regulation in the absence of willful misconduct and on the basis articulated by the district court. The regulation states that any "Department of Justice employee may request indemnification to satisfy a verdict, judgment, or award entered against the employee." 28 C.F.R. § 50.15 (c)(4). The explanation for the promulgation of the regulation indicates that "[a] change in Department policy to permit the indemnification of Department employees . . . would accord Department employees the same protection now enjoyed by most state and local government employees as well as employees of most corporate employers." *Statement of Policy Concerning Indemnification of Department of Justice Employees*, 51 Fed. Reg. 27021 (1986). Thus, the regulation operates as a form of malpractice insurance. *Cf. Derechin* v. *State University of New York*, 963 F.2d 513, 518 (2d Cir. 1992). The language of the regulation also makes it clear that what is contemplated is the reimbursement of an "employee" by its employer. Thus, the injunction in the case at bar is not one that serves to protect a client from an improper demand by its counsel to cover the costs of an order that counsel satisfy a Fed. R. Civ. P. 37(d) award. Rather it is more analogous to an injunction that an attorney not seek or accept reimbursement from the law firm that employs the attorney or a malpractice insurance carrier. *Cf. Derechin, supra.*

We recognize that the party awarded fees against an attorney under Fed. R. Civ. P. 37(d) is not able to seek recourse against that attorney's law firm, but that is a far cry from holding that *voluntary* reimbursement by a law firm or other employer should generally be enjoined. As indicated in *Derechin*, public policy against allowing insurance to cover willful misconduct may favor a prohibition on reimbursement from any source in such cases. Absent willful misconduct, however, there appears to be

no rational basis for such an injunction. Nor is the analysis under Rule 37(d) necessarily identical to that under Rule 11, as the Fifth Circuit appears to have assumed (4 F.3d at 1326, Pet. App. at 25a-26a), given its heavy reliance upon *Derechin* and on *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U.S. 120 (1989), in which this Court held that only the individual attorney who signs a pleading in violation of Rule 11, and not his law firm, could be made to pay the sanction. The two rules embody different purposes and are worded differently. Rule 11 imposes a sanction on the "signer" and is directed primarily at punishment and deterrence, *see id.*; Rule 37(d) is directed primarily at compensating one who is required to move to compel discovery in order to obtain compliance and allows an award of expenses against the party "or attorney advising that party" not to comply.

Moreover, we question the source of the court's authority to enter the supplemental injunction which, in ordering petitioner to pay plaintiffs' counsel for the expense of attending the July 28 hearing, expressly enjoined him from seeking or accepting reimbursement "from any person or entity" (Pet. App. 53a-54a). The final judgment in plaintiffs' case had been entered and discovery was no longer sought (and Rule 37 was not implicated). Both the award and the accompanying injunction therefore had to be premised upon the district court's "inherent power." However, the Fifth Circuit has held that a sanction premised upon the court's inherent power must be supported by a finding of bad faith, and no such finding was made by the district court in this case. *Resolution Trust Corp.* v. *Bright*, 6 F.3d 336, 340 (5th Cir. 1993). Nor did the district court make any specific fact findings from which the court of appeals could conclude that bad faith existed as a matter of law. Thus, the court of appeals' own fact findings appear to have blinded it to these serious legal issues.

The *amici* filing this brief are also particularly disturbed by the fact that the injunction appealed from extended to that part of the monetary award which covered plaintiffs' expense of deposing the independent contractor. (Pet. App. at 33a.) As government attorneys, we do not believe it is our responsibility to interview every independent contractor with knowledge potentially material to a lawsuit against the government before responding to discovery. Independent contractors are just that—"independent." They are equally subject to being interviewed by counsel representing any party. Moreover, in a tort case regarding the maintenance of government premises, the negligence of an independent contractor may not be attributed to the government, *Logue* v. *United States*, 412 U.S. 521 (1973), and an independent contractor may conceivably be liable to the government on an indemnity or contribution claim and thus be potentially adverse. Moreover, government attorneys certainly cannot be placed in a position of converting the statements of an independent contractor into answers to interrogatories that would then constitute admissions of the government under Rule 801 of the Federal Rules of Evidence or subject the federal official signing the answers to sanctions if the information provided proves false. In any event, a government attorney who fails to find the time to interview third parties before responding to interrogatories should not be ordered to pay for an adverse party's deposition of an independent contractor.[8] The additional sanction of enjoining a Department attorney from applying for reimbursement under the Department's indemnity regulation is a thoroughly offensive abuse of judicial power. The court of appeals'

[8] *Cf. In re Stone*, 986 F.2d 898, 904 (5th Cir. 1993): "the court should recognize that parties have a host of problems beyond the immediate case . . . [and] [t]his is particularly true of the government." (*Stone* involved a petition for a writ of mandamus to stop the Hon. John McBryde—the district judge in the instant case—from continuing a standing order that high government officials attend every settlement conference.)

treatment of this aspect of the June 2 order was woefully inadequate.

Finally, we note that the conflict between the Department's regulation and the district court's reasons for the reimbursement injunction could not be more stark. The regulation contemplates precisely that the taxpayers may bear the costs of good-faith mistakes made by government attorneys. The court of appeals must face the issue put before it on appeal and address the conflict between the district court's holding and the contrary intent of the Department's regulation.

This case reflects more than just interference with the Department's indemnity regulation in that it actually turns the regulation upside down, converting the government's trial attorney into the insurer for agency compliance with discovery. Given the Postal Service's contribution to the lack of timely compliance, and the unrebutted admission of Al Svede that the failure to produce the log was entirely his fault, the district court's failure to address the allocation of relative fault while imposing the entire cost on Mr. Means, compounded by the court of appeals' impermissible fact findings fixing the blame entirely on Mr. Means, is especially problematic.

Many of those joining this brief have faced a situation where a represented government agency has failed to produce information and documents timely. Many of us have also been involved in cases where, after repeated representations that all responsive records have been turned over, an agency suddenly found a new document responsive to an adversary's request for production.[9]

[9] This is not to suggest that the agencies we represent are irresponsible. The fact is that government agencies must keep track of large volumes of records, and something is also occasionally lost in communicating the meaning of production request specifications to agency personnel. For example, paragraph 28 of plaintiffs' production request in the instant case, the paragraph which plaintiffs' counsel insisted covered the Svede log, calls only

The prospect of having to pay, out of our own pockets, substantial monetary awards to our adversaries for such agency omissions is chilling. The prospect of then only being able to appeal such a sanction at the risk that the appellate court will make new findings that irreparably damage our reputations is grossly unfair. Faced with that choice, we may of course decide not to appeal such a sanction. But that is not justice.[10]

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for documents "in regard to the condition of the premises as a cause or possible cause of any accidents" thereat. (R. 111.) The only accident at the River Bend facility that is referenced in the Svede log is the Chilcutt accident, and the descriptive information (other than name, address, date, etc.) consists of "Injured back" and "Patron fell in lobby of Riverbend P.O." (Pet. App. at 120a.) Apart from Al Svede's July 28 testimony that he simply forgot about the log (Pet. App. 72a), which was "rolled up in a file cabinet" (Pet. App. 64a), it would not necessarily have been immediately called to mind by his review of the production request, even with the assistance of counsel. Nonetheless, Mr. Means was compelled to pay as a result of the failure of Mr. Svede to produce this innocuous document.

[10] The court of appeals' decision may surely erode confidence in the judicial system. Summary reversal would thus serve the well-recognized interest of the judiciary in maintaining the public reputation of judicial proceedings for fairness. *E.g., New York Cent. R.R.* v. *Johnson*, 279 U.S. 310, 318 (1929); *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936); *United States* v. *Olano*, 113 S. Ct. 1770, 1779 (1993).

CONCLUSION

The petition should be granted and the decision of the court of appeals should be summarily reversed with a direction to decide only the issues that were presented to it on appeal and with a further admonition to avoid making findings of fact not made by the district courts, particularly where such findings may implicate counsel in unethical conduct or otherwise tarnish an attorney's reputation.

Respectfully submitted,

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